IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

CUSTOMS APPEAL NO. 6 OF 2004

The Commissioner of Customs. ... Appellant.

V/s.

M/s.Gaurav Enterprises. ... Respondent.

S.S.Pakale with A.S.Rao i/b. Dr.T.C.Kaushik
for the appellant.

Vikram Nankani with Madhur Baya i/b. N.S.
Thacker for the respondent.

CORAM : V.C.DAGA AND J.P.DEVADHAR, JJ.

DATED : 22nd September 2005.

JUDGMENT : (Per V.C.Daga, J.)

. Heard.

. This appeal is at the instance of the Revenue. It was admitted by this court vide order dated 9th June, 2005 on the following substantial questions of law:

a) Whether the Commissioner of Customs (Adj.) was right in invoking the extended period of limitation as provided under the Customs Act, 1962 particularly in view of the fact that the Respondent had made mis-declaration for claiming benefits of notification no.11/97 dated 1.3.97?

b) Whether the importer is liable for penalty under Section 114A of the Customs Act when duty was short levied due to mis-declaration made by him?

c) Whether on the facts and in the circumstances of the case, the Tribunal was right in law in setting aside the Order-in-Original CAO No.339/CAC/CC/K.M.T.

dated 16.08.2002 passed by the Commissioner of Customs (Adj.), Mumbai who has rightly held that the importer i.e. the Respondent firm has willfully mis-declared the goods under reference and wrongly availed the benefit of Notification no.11/97-cus dated 1.3.97?

Facts :
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2. The officers of the Directorate of Revenue Intelligence, Mumbai ("DRI" for short) were in receipt of an information indicating that certain importers were mis-using Customs Notification No.11/97-Cus dated 1st March, 1997 inasmuch as goods incapable of being used as "Insole Sheets" in Leather Industry were being cleared at concessional rate of duty under the said notification after availing exemption benefit. Pursuant to the said intelligence report, the officers of DRI intercepted certain consignments of "Nylon Tricot Flocking Fabrics", imported at Mumbai Port, and drew samples and forwarded it to the Central Leather Research Institute, Adayar, Chennai for testing and soliciting their opinion. The said Institute vide its letter dated 30th December, 1997 opined that the Nylon Tricot Flocking Fabric material could not be used as Insole or Insole Sheet material in manufacture of shoes.

3. On another reference made by the DRI officers, a technical opinion dated 29th November, 1996 was received by them from the Indian Institute of Leather Products, Chennai, inter alia, stating that "Nylon Tricot Flocking Fabrics" is not used as Insole in footwear making.

4. In the prima facie opinion of the Revenue, the respondent-assessee had made misdeclaration and one Mr.Niren Champaklal Ajmera of M/s.Gaurav Enterprises and M/s.Gaunir Impex Pvt.Ltd., engaged in the import of Nylon Tricot Flocking Fabrics were held responsible for claiming benefits of notification No.11/97-Cus dated 1st March, 1997.

5. A statement of Mr.Niren Champaklal Ajmera was thus recorded under section 108 of the Customs Act, 1962; wherein he inter alia; stated that their company was engaged in import of lining material; that they had cleared consignment of "Nylon Tricot Flocking Fabrics" as ‘Insole material for leather footwear by availing the benefit of notification No.11/97-Cus. It was further stated that they did not; manufacture any leather goods or shoes or any products made out of leather and that they sold the imported Nylon Tricot Flocking Fabrics to various parties who were traders only. It was

admitted that under the said notification, there was no exemption benefit for "Nylon Tricot Flocking Fabrics".

6. Based on the aforesaid material, show cause notice was issued to the respondent-firm for misdeclaration of the goods alleging therein that the respondent-firm had filed 16 bills of entry for the import of "Nylon Tricot Flocking Fabrics" declaring the same as "Sheets for making Insole" and declaring their (the said 16 bills of entry) assessable value at Rs.1,61,53,247/-. On the basis of the declaration made by them, those 16 bills of entry were assessed to a concessional rate of duty extending the benefits of Notification no.11/97-cus dated 1st March, 1997.

7. The above show cause notice was replied by the noticee.

8. The Commissioner of Customs (Adj.) upheld the charges levelled by the Department and confirmed the show cause notice vide his order-in-original dated 16th August, 2002.

9. Being aggrieved by the aforesaid order, the respondent herein preferred an appeal before the Customs, Excise and Service Tax Appellate Tribunal,

West Zonal Bench at Mumbai ("Tribunal" for short), who vide its order dated 7th January, 2004 was pleased to set aside the order-in-original dated 16th August, 2002 holding that the demand made was barred by limitation.

10. Being aggrieved by the aforesaid order of the Tribunal, the present appeal has been filed by the appellant-Revenue raising purported substantial question of law extracted in the opening paragraph of this judgment.

Submissions :
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11. Mr.Pakale, learned counsel for the appellant-Revenue submits that while declaring the goods under bills of entry, if the claim for exemption is found to be untenable, in that event, it would amount to misdeclaration of the goods which will enable the department to extend the period of limitation and, therefore, the order of the Tribunal holding that the demand is barred by limitation is erroneous and is liable to be set aside.

12. Per contra, Mr.Nankani, learned counsel appearing for the respondent submits that there is no misdeclaration of the goods. He has pointed that the goods were declared as "Nylon Tricot Flocking

Fabrics Sheets for making Insole". In his submission the goods imported were "Nylon Tricot Flock Fabrics" only. Mere mention of a wrong notification to claim exemption cannot be said to be a misdeclaration of goods under the Act.

13. Mr.Nankani, in support of the above submission, relied upon the judgment of the Apex Court in the case of **Northern Plastic Ltd. v. Collector of Customs and Central Excise**, 1998 (101) ELT 549 (SC) and pressed into service para-22 of the said judgment, which reads thus:

> 22. As the goods imported by the appellant were being used and intended to be used as Cinematographic Film, the appellant had described them as Cinematographic films covered by sub-heading 3702.20. No attempt was made by the customs authorities either before the Collector or before CEGAT to show that the goods imported by the appellant were ordinarily not used as Cinematographic Films or were not intended by the appellant for such a use. Moreover, looking to the Heading 3702 and its sub-heading, it does not appear that such goods were intended to be covered by sub-heading 3702.90. As regards the claim for exemption in payment of countervailing duty the appellant had stated that it was entitled to the benefit under Notification No.50/88-C.E. The declaration made by the appellant has been found to be wrong by the Collector and CEGAT on the ground that there was a separate exemption notification in respect of jumbo rolls for Cinematographic Films. While dealing with such a claim in respect of payment of customs duty we have already observed that the declaration was in the nature of a claim made on the basis of the belief entertained by the appellant and

> therefore, cannot be said to be a misdeclaration as contemplated by Section 111(m) of the Customs Act. As the appellant had given full and correct particulars as regards the nature and size of the goods, it is difficult to believe that it had referred to the wrong exemption notification with any dishonest intention of evading proper payment of countervailing duty.
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> (Emphasis supplied)

14. Mr.Nankani, learned counsel for the respondent-assessee further submits that the demand in the show cause notice pertains to the period from August, 1997 to May, 1998, whereas the reports referred to in para-41 of the order in original were available with the appellant-Revenue in the month of November, 1996 as well as in the month of December, 1997. In spite of these reports, the goods were cleared on the basis of the bills of entry filed by the respondent. In the circumstances, Mr.Nankani submits that there could hardly be said to be a case of misdeclaration.

15. Mr.Nankani further submits that the original authority did not record any finding with respect to the show cause notice being barred by limitation in spite of specifically raising the question before it and, therefore, the appellate authority could not have dealt with this aspect of the matter.

16. Mr.Nankani further placed reliance on the Circular No. 74/98-Cus dated 6th October, 1998 to contend that prior to the issuance of the circular the Commissioner of Customs, Mumbai had considered the "Nylon Tricot Fabrics" to be covered under the heading Insole and Midsole. Which, ultimately, resulted in issuance of the circular in question so as to clarify that the exemption is not available under the said notification No.11/97-Cus. He, thus, submits that if prior to the issuance of this circular an exemption was allowed, then, no case of misdeclaration can be alleged or make out by the Revenue. He also placed reliance on the judgment of the Tribunal in the case of **Mahavir Corporation v. Commissioner of Customs** dated 19th March, 2003; wherein the Tribunal has upheld the contention that when the goods were found to be misdeclared with regard to the exemption that by itself was not sufficient to hold that the importer was guilty of suppression. At this juncture, it will not be out of place to mention that the said view of the Tribunal finds support from the subsequent judgment of the Apex Court in the case of **Northern Plastics Ltd.** (supra).

17. Having heard rival parties and having examined the factual scenario and the law laid down

by the Apex Court in the case of **Northern Plastics Ltd.** (supra), we are of the view that even if the declaration made by the respondent-assesse with regard to the claim for exemption in payment of duty therein and that the respondent was entitled to exemption under Notification No.11/97-Cus, the respondent did not commit any wrong. It cannot be said to be a case of misdeclaration.

18. In that view of the matter, there is no wilful suppression of facts or wilful misdeclaration by the respondent assessee. Consequently, the Tribunal was justified in taking a view that the demand was barred by limitation. In that view of the matter, the Commissioner of Customs was not justified in invoking the extended period of limitation holding that the importer i.e., respondent herein was liable to pay penalty under section 114-A of the Customs Act.

19. Appeal is, accordingly, dismissed in limine with no order as to costs.

(J.P.DEVADHAR, J.) **(V.C.DAGA, J.)**